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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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CS Docket No. 95-178

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In the Matter of

Definition of Markets for Purposes of
the Cable Television Mandatory
Television Broadcast Signal Carriage Rules

To the Commission:

REPLY COMMENTS

The law firm of Cole, Raywid & Braverman ("CR&B") hereby submits these Reply Comments in the above-referenced proceeding.¹ CR&B restates here its strong support for the Commission's tentative conclusion to continue using Arbitron's ADI list to define local must carry zones. Most of the Comments asserting a contrary position reflect nothing more than the parochial interests of particular broadcasters who would happen to experience a carriage windfall if the Commission switched from ADI to DMA designations. In arguing that updated DMA designations are necessary to ensure that must carry rights closely match current programming and advertising markets, these broadcasters belittle counterbalancing concerns for carriage stability. In fact, those advocating change have failed to demonstrate why the Commission must abandon the current ADI designations.

¹ CR&B files these comments on behalf of the cable television operators and state cable television associations identified in Attachment A hereto.

The Association of Local Television Stations ("ALTV"), in particular, expresses outrage at the "radical change" proposed in this rulemaking. *ALTV Comments* at 2. There is, of course, nothing "radical" about the proposal to maintain the current ADI designations. Nor is there anything improper or nefarious about the Commission reconsidering an earlier Order, especially when circumstances beyond the FCC's control (Arbitron's termination of ADI-ratings) affect an existing rule. Indeed, that is precisely why the Commission issued the *Notice of Proposed Rulemaking*. The FCC now has the benefit of having witnessed the initial must carry/retransmission consent process, as well the ability to ascertain the precise market changes that would result from abandoning the existing ADI designations in favor of the updated Nielsen designations. There is no reason why the Commission should be foreclosed from reevaluating its earlier decision in order to better serve the public interest.

The broadcast Commenters generally argue that updated DMA designations should be adopted to track the constant evolution of television markets. In fact, the extent of this evolution is far from clear. While the NAB states that the proposed switch to Nielsen would create 126 market changes, it does not quantify how many of these changes are due to market evolutions and how many to long-standing differences between Arbitron and Nielsen. *NAB Comments* at 4. NAB itself concedes that "many of these changes are attributable to slight differences in the methodologies and criteria used by Arbitron and Nielsen." *Id.* To the extent the changes reflect institutional differences, there is no compelling reason why the Commission, having previously relied on Arbitron, should suddenly switch to Nielsen.

Assuming *arguendo* that television markets are evolving rapidly, it does not necessarily follow that the Commission should seek to precisely match this evolution in its

must carry designations. To the contrary, cable operators serving "border" areas should not be forced to immediately adjust their channel line-up every time Nielsen happens to revise its market assignments. Cable customers expect a consistency in channel carriage. The Commission's carriage regulations should respect, rather than frustrate, this expectation. Indeed, the first factor identified by Congress to help determine whether an existing television market should be modified is "historic carriage." 47 U.S.C. § 534(h)(1)(C).

The compulsory copyright implications of reassigning television markets is particularly troubling for purposes of carriage continuity. Not surprisingly, the issue is largely ignored by the broadcast Commenters. The Copyright Office has expressly acknowledged in this proceeding, however, that the copyright "free" zone of a broadcast station will follow the Commission's "local" market designation. *Copyright Office Comments* at 3-4. Accordingly, if the switch from ADIs to DMAs occurs, continued carriage of stations from an "old" ADI market may suddenly impose substantial new copyright liability. Operators interested in satisfying customer expectations by providing programming continuity will have no choice but to drop existing stations that are assigned to another DMA or incur substantial additional copyright costs (which would then be "passed through" to subscribers.)²

Although certain broadcast Commenters suggest grave dangers in permanently "freezing" must carry markets based on existing ADI assignments, CR&B believes those dangers to be unrealistic. The must carry rules already provide a mechanism to modify

² CR&B suspects that an unspoken assumption underlying NAB's advocacy of updated DMA designations is the belief that cable operators will continue to carry voluntarily broadcast stations already carried from the old "ADI" and be required to add stations from the new "DMA." As just explained, compulsory copyright fees generally will preclude this response.

existing market assignments, 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59, and broadcasters have used that mechanism successfully to expand their must carry zone. CR&B presumes that most broadcasters and cable operators who believe that a market should be modified have already filed appropriate petitions for special relief. If the existing ADI approach is retained, broadcasters, cable operators, and the Commission presumably have most of the work and uncertainty surrounding market assignments behind them. However, a change to updated DMA assignments is likely to prompt a whole new round of special relief petitions, as ADI anomalies already addressed surely will be matched by new and different DMA anomalies.

CR&B applauds the Post Company, licensee of an Idaho Falls television station, for acknowledging that the "adoption of new market designations will result in the widespread reshuffling of cable carriage line-ups with no appreciable benefit to the public." Post Comments at 1. The Post Company notes that a triennial revision of market assignments "will waste the time and resources of television licensees, cable operators and the Commission and will not benefit the public." *Id.* at 2. It correctly concludes that continued reliance of Section 614(h) petitions "is a better way to correct any anomaly which may arise." *Id.*

In any event, a decision to retain Arbitron's ADI assignments now does **not** permanently bind the Commission. Great Trails Broadcasting Corp., for example, advocates a change to Nielsen, but recommends that the change be delayed until the next must carry/retransmission consent election. Great Trails correctly notes:

[H]aving only been through a single cycle of election and negotiations, both television stations and cable systems are still relatively new to the process. Changing market definitions would add another level of complexity to negotiations, which as the FCC may recall, were difficult and protracted three years ago because of the newness of the rules. [*Great Trails Comments* at 7.]

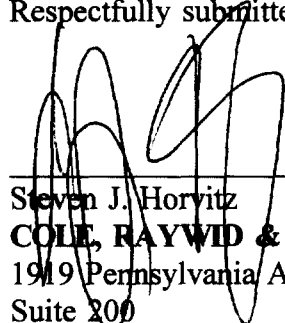
Should the Commission experience a significant increase in market modification petitions over the next three years, it might reasonably conclude that it would be more sensible to abandon Arbitron's existing ADI assignments in favor of Nielsen's updated DMA assignments. But for the time being, the evidence supports the opposite conclusion. It makes far more sense to continue responding to market evolution on a case-by-case basis, rather than through a wholesale adjustment that is likely to trigger an avalanche of market modification requests.³ Making a dramatic (and unnecessary) change now would be particularly troubling as cable operators and broadcasters have already begun preparing for the next must carry/retransmission consent election. In addition, the Commission already faces a tremendous administrative burden implementing the 1996 Telecommunications Act, and it would be difficult, if not impossible, to resolve in a timely fashion the new onslaught of market modification request that would surely follow an abandonment of the existing ADI list.

³ For the record, Cole, Raywid & Braverman does **not** support must carry in general or the propriety of imposing must carry obligations based on television market ratings. To the extent such an obligation exists, however, it supports retaining the exiting ADI list rather than switching to a new DMA list.

CONCLUSION

For the foregoing reasons, and the reasons set forth in its Comments, Cole, Raywid & Braverman respectfully requests that the Commission adopt its tentative conclusion and retain the existing ADI list, rather than adopting an updated DMA list, for purposes of defining "local" must carry markets.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Steven J. Horvitz', is written over a horizontal line.

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February 26, 1995